

**OFFICIAL FILE**  
**ILLINOIS COMMERCE COMMISSION**

Before the  
ILLINOIS COMMERCE COMMISSION

**ORIGINAL**

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In the Matter of the Petition of )  
SCC Communications Corp. )  
for Arbitration Pursuant to Section 252(b) ) Docket No. 00-0769  
of the Telecommunications Act of 1996 )  
to Establish an Interconnection Agreement )  
with SBC Communications Inc. )  
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**SCC COMMUNICATIONS CORP.'S RESPONSE TO  
AMERITECH ILLINOIS' MOTION  
TO STRIKE PORTIONS OF THE PETITION**

Comes now SCC Communications Corp. ("SCC") and files this Response to Illinois Bell Telephone Company's d/b/a Ameritech Illinois' ("Ameritech Illinois") Motion to Strike Portions of the Petition ("Motion"). Ameritech Illinois' attempt to strike from SCC's Petition for Arbitration ("Petition") the entire Factual Background section and all associated attachments<sup>1</sup> is contrary to law. The Illinois Commerce Commission ("Commission") is empowered to determine whether a party has met its obligation to negotiate an interconnection agreement in good faith, based upon the facts and circumstances underlying the parties' negotiations. SCC's Petition for Arbitration ("Petition") properly sets forth the factual context of the parties' interconnection negotiations, and SCC urges the Commission to deny the Motion.

**I. A PARTY'S FAILURE TO NEGOTIATE INTERCONNECTION IN GOOD FAITH IS RELEVANT AND PROPERLY CONSIDERED BY THE COMMISSION IN AN ARBITRATION PROCEEDING.**

The Communications Act of 1934, as amended, ("Act") and the rules of the Federal Communications Commission ("FCC") impose an affirmative duty on telecommunications

<sup>1</sup> See Motion at 4 and attachment.

carriers to negotiate the terms and conditions of interconnection agreements in good faith.<sup>2</sup> This explicit obligation is ongoing, and state commissions are charged with determining whether a party has met its obligation to negotiate in good faith, based upon the facts and circumstances underlying the parties' negotiations.<sup>3</sup> Ensuring that incumbent carriers honor their duty to negotiate in good faith is crucial to providing new entrants with the best opportunity to reach complete and workable interconnection agreements.<sup>4</sup> Thus, the FCC has "strongly encourage[d] state commissions, in addition to satisfying their mediation and arbitration responsibilities under section 252, to enforce vigorously all carriers' duty to negotiate in good faith."<sup>5</sup>

Moreover, the Act permits, encourages, and requires parties to set forth the facts surrounding interconnection negotiations in a petition for arbitration. The Factual Background section of SCC's Petition and the associated attachments fulfill the Act's mandate by providing the Commission with sufficient detail to give context to the parties' protracted and unsuccessful negotiations that have yielded numerous unresolved issues. Further, the facts surrounding the parties' negotiations provide valuable information the Commission requires so that it can satisfy its obligation to "enforce vigorously" Ameritech Illinois' duty to act in good faith.<sup>6</sup>

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<sup>2</sup> See 47 U.S.C. § 251(c)(1) ("[E]ach incumbent local exchange carrier has the following duties: (1) DUTY TO NEGOTIATE – The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of [interconnection] agreements."), see also 47 C.F.R. § 51.301(a) ("An incumbent LEC shall negotiate in good faith the terms and conditions of agreements to fulfill the duties established by sections 251 (b) and (c) of the Act.").

<sup>3</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98 at ¶ 150 (rel. Aug. 8, 1996) (*Local Competition Order*). See *id.* ("determining whether a party has acted in good faith often will need to be decided on a case-by-case basis by state commissions or, in some instances, the FCC, in light of all the facts and circumstances underlying the negotiations."). See also *Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 12 FCC Rcd 15594, 15612 (1997) (*MCI Order*) (Exhibit 1 hereto).

<sup>4</sup> See *MCI Order* at 15612.

<sup>5</sup> *Id.*

<sup>6</sup> Ameritech Illinois is not prejudiced by the inclusion of this information, for the Act gives Ameritech Illinois full opportunity to respond and "provide such additional information as it wishes." 47 U.S.C. § 252(b)(3).

Ameritech Illinois' contention that Commission precedent somehow requires that the Factual Background section of SCC's Petition and the associated attachments be stricken is misplaced, for that precedent ultimately undermines rather than supports Ameritech Illinois' position. The cases cited by Ameritech Illinois in its Motion simply highlight the truism that a party's alleged bad faith is not a proper issue for an arbitration. Arbitration awards are properly limited to issues regarding the terms and conditions of interconnection agreements. Thus, in both *In re Low Tech Designs* and *AT&T I*, the Commission determined that it was improper to list as a specific issue for arbitration an incumbent local exchange carrier's duty to negotiate in good faith.<sup>7</sup> Recognizing this principle, SCC did not list Ameritech Illinois' bad faith as an issue for arbitration; thus, the cases cited by Ameritech Illinois on this point are inapposite.

Moreover, Commission precedent certainly does not foreclose the Commission from evaluating, based on the facts and circumstances of the parties' negotiations, whether Ameritech Illinois has complied with its duty to negotiate in good faith. In fact, the opposite is true, for the Commission has concluded that a party's bad faith is highly relevant and may be a determining factor in the outcome of an arbitration.<sup>8</sup> In *AT&T II*, having resolved 69 open issues subject to arbitration (none of which involved a party's bad faith), the Commission ordered the parties to submit a complete interconnection agreement reflecting the Commission's conclusions. In so doing, the Commission expressly stated as follows:

[t]o incent the parties to act in good faith and with due diligence the Commission makes the following conclusion: demonstration that one party has not acted in

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<sup>7</sup> See *In re AT&T Communications of Illinois, Inc.*, Arbitration Decision, Docket Nos. 96 AB-003/004 (consol.), 1996 WL 769790, at \*35 (Ill.C.C. Nov. 26, 1996) (*AT&T I*); *In re Low Tech Designs, Inc.*, Arbitration Decision, Docket No 97-AB-001, March 31, 1997, at 1.

<sup>8</sup> See *In re AT&T Communications of Illinois, Inc.*, Arbitration Decision, Docket No. 96 AB-005, 1996 Ill. PUC LEXIS 699, at \*152 (Ill.C.C. Dec. 3, 1996) (*AT&T II*) (Exhibit 2 hereto).

good faith or with due diligence will result in our adopting in total the non-offending party's proposed agreement.<sup>9</sup>

Thus, the Commission properly considered the parties' conduct to "enforce vigorously [the] carriers' duty to negotiate in good faith."<sup>10</sup> SCC asks the Commission to do the same in the instant proceeding by considering the facts set forth in SCC's Petition and the attachments thereto.

Ameritech Illinois' contention that SCC has not asked the Commission for a determination of Ameritech Illinois' bad faith is both wrong and irrelevant. SCC's Petition repeatedly calls into question Ameritech Illinois' conduct during the parties' negotiations and whether such conduct breaches Ameritech Illinois' duty to negotiate in good faith.<sup>11</sup> SCC's Petition makes clear that SCC wishes the Commission to determine that Ameritech Illinois has acted in bad faith.<sup>12</sup> However, whether SCC expressly asked for such a determination in its Petition is irrelevant. As discussed above, the Commission is empowered to determine whether a party has met its obligation to negotiate in good faith, and the Commission has broad latitude to enforce carriers' duty to negotiate in good faith. The Factual Background section of SCC's Petition and the associated attachments provide the necessary factual context for the Commission to do so.<sup>13</sup> Ameritech Illinois' Motion should be denied.

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<sup>9</sup> *Id.*

<sup>10</sup> *MCI Order* at 15612.

<sup>11</sup> *See In re Petition of SCC Communications Corp. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with SBC Communications Inc.*, Petition for Arbitration, Docket No. 00-0769, at 6, 21 n.55, 47, 58 & 92.

<sup>12</sup> If Ameritech Illinois is suggesting that it would be appropriate for SCC to state the facts surrounding the parties' negotiations in a motion for sanctions, SCC would be more than happy to oblige.

<sup>13</sup> SCC did not include the Factual Background section and associated attachments in its Petition to "poison the well," as Ameritech Illinois alleges. *Motion* at 4. Rather, SCC included the Factual Background section and associated attachments to provide the Commission with the necessary factual context to permit the Commission to enforce the parties' obligation to negotiate in good faith. The facts outlined in the Factual Background section of

## **II. THE FACTS SURROUNDING THE PARTIES' NEGOTIATIONS DEMONSTRATE AMERITECH ILLINOIS' FAILURE TO ACT IN GOOD FAITH.**

It is well established that actions intended to delay negotiations, including a party's failure to designate a representative with authority to make binding representations on behalf of the party, violate the duty to negotiate in good faith.<sup>14</sup> As set forth in the Factual Background section of SCC's Petition and the associated attachments, the parties' negotiations for interconnection commenced on March 28, 2000; yet, it took Ameritech Illinois four months to assign a "lead negotiator" with authority to make binding representations on Ameritech Illinois' behalf. Moreover, as set forth in the Factual Background section of SCC's Petition and the associated attachments, during the course of the parties' negotiations, which are now more than nine months old, Ameritech Illinois introduced countless "subject matter experts" to the parties negotiations. Most of these experts, by their own admission, were unfamiliar with SCC's business plan and interconnection needs and were unwilling or unable to make binding representations on Ameritech Illinois' behalf. Ameritech Illinois' failure to designate representatives with authority to make binding representations on Ameritech Illinois' behalf delayed the parties' negotiations considerably, wasted the parties' resources, and violated Ameritech Illinois' duty to negotiate in good faith.

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SCC's Petition and the associated attachments evidence a pattern of behavior designed to delay the parties' negotiations, deprive SCC of its rights under the Act, and stifle competition. That those facts might "paint Ameritech Illinois [in] an unflattering light" is of no consequence. *Motion* at 1. The facts are what they are, and they clearly demonstrate Ameritech Illinois' failure to act in good faith. If Ameritech Illinois takes offense to the facts, it has only itself to blame.

<sup>14</sup> See 47 C.F.R. § 51.301(c)(7) ("the following actions or practices, among others, violate the duty to negotiate in good faith: ... (7) Refusing throughout the negotiation process to designate a representative with authority to make binding representations, if such refusal significantly delays resolution of the issues"); see also *Local Competition Order* at ¶ 154 ("If a party refuses throughout the negotiation process to designate a representative with authority to make binding representations on behalf of the party, and thereby significantly delays resolution of issues, such action would constitute failure to negotiate in good faith.").

In addition, “it is a *per se* failure to negotiate in good faith for a party to refuse to include in an agreement a provision that permits the agreement to be amended in the future to take into account changes in [FCC] or state rules.”<sup>15</sup> Yet, as set forth in the Factual Background section of SCC’s Petition and associated attachments, this is precisely what Ameritech Illinois has done. As Attachment 26 to SCC’s Petition demonstrates, Ameritech Illinois insists that it has “no obligation to provide access to any network element, or to provide terms and conditions associated with any network element, other than expressly set forth” in its agreement with SCC.<sup>16</sup> Moreover, Ameritech Illinois specifically refused to include in the agreement language that would entitle SCC to any unbundled network element established by applicable law.<sup>17</sup> Ameritech Illinois took this position despite the FCC’s mandate that competitors are entitled to the national list of unbundled network elements established by the FCC, unbundled network elements established by FCC decisions modifying that list, and additional unbundled network elements established by state commissions.<sup>18</sup> Ameritech Illinois’ attempt to deprive SCC of the ability to avail itself of future changes in the law flies in the face of established law and is a *per se* violation of Ameritech Illinois’ duty to negotiate in good faith.

Likewise, “an incumbent LEC may not deny a requesting carrier’s reasonable request for cost data during the negotiation process, because ... such information is necessary for the

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<sup>15</sup> *Local Competition Order* ¶ 152. See 47 C.F.R. § 51.301(c)(3) (“the following actions or practices, among others, violate the duty to negotiate in good faith: ... (3) Refusing to include in an arbitrated or negotiated agreement a provision that permits the agreement to be amended in the future to take into account changes in [FCC] or state rules.”).

<sup>16</sup> See Appendix UNE § 1.5, dated Sept. 29, 2000, attached to SCC’s Petition as Attachment 26.

<sup>17</sup> See *id.*

<sup>18</sup> *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order ¶¶ 120, 124, 149 & 153, 15 FCC Rcd 3696 (rel. Nov. 5, 1999) (“*UNE Remand Order*”).

requesting carrier to determine whether the rates offered by the incumbent LEC are reasonable.”<sup>19</sup> Refusing to provide such cost data violates the duty to negotiate in good faith.<sup>20</sup> The Factual Background section of SCC’s Petition and the associated attachments demonstrate that despite SCC’s repeated requests for cost data, Ameritech Illinois refused to provide such data. In fact, to date, Ameritech Illinois has not provided SCC with such data. By failing to provide SCC with the cost data it requested, Ameritech Illinois violated its duty to negotiate in good faith.

Granting Ameritech Illinois’ Motion would effectively sanction such conduct – the very conduct that the Act prohibits, that the duty to negotiate in good faith is designed to safeguard against, and that the Commission is authorized to scrutinize. SCC’s Petition and the associated attachments state facts that establish Ameritech Illinois’ failure to act in good faith. Ameritech Illinois should not be permitted to escape responsibility for its actions by hiding behind a motion to strike. Ameritech Illinois’ Motion should be denied.

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<sup>19</sup> *Local Competition Order* ¶ 155.

<sup>20</sup> *See id.*

## CONCLUSION

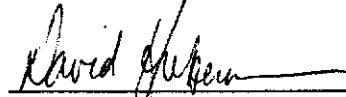
For the foregoing reasons, SCC respectfully urges the Commission to deny Ameritech Illinois' Motion.

Dated: January 4, 2001

Respectfully submitted,

SCC Communications Corp.

By:



Craig W. Donaldson  
David A. Huberman  
Rebecca E. Boswell  
SCC Communications Corp.  
6285 Lookout Road  
Boulder, CO 80301  
Tel: (303) 581-5600  
Fax: (303) 581-0900  
cdonaldson@sccx.com  
dhuberman@sccx.com  
rboswell@sccx.com



**CERTIFICATE OF SERVICE**

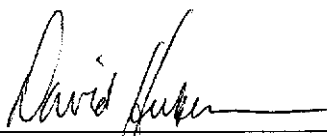
I certify that I caused copies of the foregoing Response to Ameritech Illinois' Motion to Strike Portions of the Petition to be served on this 4<sup>th</sup> day of January, 2001 on the following persons by the indicated means:

Terrence Hilliard  
Claudia Sainsot  
Leslie Haynes  
Hearing Examiners  
Illinois Commerce Commission  
160 North LaSalle Street  
Chicago, Illinois 60601  
(by overnight delivery and e-mail)

David L. Nixon  
Mary J. Stephenson  
Nora Naughton  
Illinois Commerce Commission  
160 North LaSalle Street  
Chicago, Illinois 60601  
(by overnight delivery and e-mail)

Theodore A. Livingston  
Dennis G. Friedman  
Mayer, Brown & Platt  
190 South LaSalle Street  
Chicago, Illinois 60603  
(by overnight delivery and e-mail)

Nancy A. Wittebort  
Ameritech Illinois  
225 West Randolph Street  
Chicago, Illinois 60606  
(by overnight delivery)

  
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David A. Huberman